# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**FIRST APPEAL No. 2937 of 2004**
**With**
**CIVIL APPLICATION No. 8171 of 2005**
**In**
**FIRST APPEAL No. 2937 of 2004**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE R.S.GARG**
**HONOURABLE MR.JUSTICE K.M.MEHTA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**JIVIBENNATAHBHAIAHER & 8 - Appellant(s)**

**Versus**

**JIVTIBENJINABHAI & 1 - Defendant(s)**

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**Appearance :**
MR ASHISH M DAGLI for Appellant(s) : 1 - 2, 2.2.1, 2.2.2,2.2.3 - 3, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5,3.2.6 - 9.
None for Respondents(s) : 1 - 2.
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**CORAM : HONOURABLE MR.JUSTICE R.S.GARG**
**and**
**HONOURABLE MR.JUSTICE K.M.MEHTA**

**Date : 04/10/2005**

**COMMON ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE R.S.GARG)**

1. Mr. Dagli, learned counsel for the appellants heard on the question of admission. Special Civil suit No. 24 of 1994 was filed by Jivtiben Jinabhai and her daughter Kaliben Jinabhai against number of the defendants for partition by metes and bounds, separate and specific possessions and mesne profits of certain properties, which belonged to Nathabhai Ahir. The submission for partition was that Jinabhai, who had pre-deceased his father Nathabhai in the year 1970, had left behind him the plaintiff no.1 as widow and plaintiff no.2 Kaliben in the mother's womb. The submission in the suit was that after the death of one of the co-parcener, who had a right in the Joint Hindu Family property and if is survived by female heir of Class-I, then, the property would be deemed to be partitioned and such person would be entitled to his share in the property. The defendants appeared in the suit, did not deny the marriage of Jinabhai with Jivtiben. They however, submitted that Kaliben was not daughter of the deceased Jinabhai, but was daughter of someone else with whom Jivtiben had married after the death of Jinabhai. As the parties

joined the issue, the learned trial court allowed the parties to lead evidence. The parties led evidence in support of their pleadings. After hearing the parties, the learned trial court held that the plaintiff no.1 was legally wedded wife of the deceased Jinabhai Nathabhai at the time of death of Jinabhai Nathabhai and the plaintiff no.2 was a child born from co-habitation of the deceased Jinabhai and the plaintiff no.1 Jivtiben, the suit was not barred by limitation, there were no acquiescences or estoppel, the suit did not suffer from the defect of non-joinder of parties. The court accordingly directed that the plaintiffs would be entitled to 1/5$^{th}$ share in the suit property. The court accordingly directed that proceedings under Order XX Rule 12 of Code of Civil Procedure be taken up.

2. Being aggrieved by the judgment and decree, dated 29$^{th}$ December, 2003, passed by the learned Second Joint Civil Judge (Senior division), Junagadh, decreeing the suit, the defendants are before this Court, submitting, inter alia, that the court below was unjustified in recording the findings in favour of the plaintiffs. It was submitted that as Jivtiben had re-married immediately after the death of her husband Jinabhai, she was not

entitled to any share in the property and as Kaliben was not a child from Jinabhai, she was not entitled to maintain the suit.

3. We are not referring to the evidence in detail, because, we are in general agreement with the findings recorded by the court below, but we would propose to refer to salient features of the matter. It is the case of the appellants/defendants that Jinabhai died somewhere in the year 1970, though exact date or month is not given, but the submission is that he died somewhere in the year 1970. From the records, it would clearly appear that the date of birth of Kaliben is 28.6.70. If the date of birth is 28th June, 1970, then, the period of 9 months would commence somewhere in September, 1969. The law has presumption in favour of legitimacy of a child and opposes bastardity or illegitimacy. If in September, 1969, Jinabhai was alive and there are no allegations against Jivtiben that she was leading or living immoral life, then, presumption would be that Kaliben is a child out of co-habitation of Jivtiben and Jinabhai. It was then submitted that as Jivtiben did not file the suit immediately after the death of her husband or Kaliben did not file the suit through her next friend or guardian,

the suit is barred by limitation. In our considered opinion, this would not be correct. The law of limitation says that if some person is suffering from any disability or is a minor, then, limitation would start running from the date of removal of disability or from the date of attaining majority. In case, where somebody is minor on the date of accrual of the cause of action, then, such person can file a suit within a period of three years from the date of attaining majority. Present suit has been filed in the year 1990. The suit has been filed within three years from the date of attaining the majority. If a person has limitation available to him, then, nobody can ask him to take an action at the starting point of the limitation. If the law says that action would be proper till the last date of limitation, then, by no stretch of imagination, it can be said or argued that there was delay in taking action. In a suit for recovery of possession, if limitation provided is 12 years, then, any person in adverse possession would not acquire right by prescription on completion of 11 years and 364 days. He would acquire right only on completion of 12 years and if the suit is filed beyond 12 years, then, such suit would be barred by limitation. Any action taken within limitation cannot be said to be

delayed action and it also cannot be said that by not bringing action immediately, there was some acquiescence.

4. It was submitted that in relation to the land, such decree ought not to have been passed, because, the plaintiffs are residing in different village and they would dispose of the property to someone else. The argument is one of frustration. After receiving the share and becoming full owner of the property, the plaintiff would be entitled to dispose of the property as they want. The defendants/judgment debtors are not entitled to say that the suit cannot be decreed, because, the plaintiffs would not cultivate the land. The defendants are not conscious keepers of the plaintiffs nor they are entitled to interfere with the proprietary rights of the plaintiffs.

5. After hearing the learned counsel for the appellants at length, we are also unable to hold that the suit suffers from the defect of non-joinder of necessary parties.

6. As we are in general agreement with the findings

recorded by the court below and have also detailed out the reasons for ourselves, we are of the opinion that the appeal deserves to be dismissed. It is accordingly dismissed. Consequently, Civil Application No. 8171 of 2005 is rejected.

***[R.S. GARG, J.]***

***[K.M. MEHTA, J.]***

***pirzada/-***